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IN THE

**Supreme Court of the United States**

OCTOBER TERM 1963

**UNITED STATES OF AMERICA,**

*Appellant,*

*v.*

**WARD BAKING COMPANY, et al.,**

*Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA.**

**BRIEF FOR APPELLEES.**

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## TABLE OF CONTENTS.

	PAGE
Opinion Below .....	1
Jurisdiction .....	1
Statutes Involved .....	1
Questions Presented .....	2
Statement .....	2
Summary of Argument .....	8

### ARGUMENT:

I. Under Section 5(a) of the Clayton Act the district court legitimately had the power to enter the bakeries' decree because the government's objection to entering that decree was arbitrary .....	10
A. The district court had the power to test the arbitrariness of a demand by the government in consent decree negotiations.....	10
B. The government's demand for a broader injunctive provision than was prayed for in its complaint was arbitrary and unlawful in view of the record in this case.....	14
C. The district court may in its discretion enter a decree under Section 5(a) over the objection of the government in a manner similar to the acceptance by it of a plea of <i>nolo contendere</i> .....	20
D. The action of the district court enhances antitrust enforcement .....	23

II. The Supreme Court's review in this case is merely one of reviewing the district court's discretion and the government has not shown that the court has abused its discretion; nor has the government shown that it has been left without a remedy because the district court has expressly retained jurisdiction of the case.....	24
III. The broad remedial powers of an equity court support the decision below and cannot be restricted by the government.....	29
Conclusion .....	32
Certificate of Service.....	33

## CITATIONS.

	PAGE
<i>American Mach. &amp; Metals, Inc. v. De Bothezat Impeller Co.</i> , 82 F. Supp. 556 (S. D. N. Y. 1949).....	31
<i>Associated Press v. United States</i> , 326 U. S. 1 (1945)	26, 28
<i>Cafeteria &amp; Restaurant Workers v. McElroy</i> , 367 U. S. 886 (1961) .....	11, 12
<i>Cherney v. Holmes</i> , 185 F. 2d 718 (7th Cir. 1950).....	31
<i>Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.</i> , 5 TRADE REG. REP. (1963 Trade Cas.) ¶70884 (7th Cir. Sept. 12, 1963).....	15, 20, 21
<i>Daitz Flying Corp. v. United States</i> , 4 F. R. D. 372 (E. D. N. Y. 1945), <i>rev'd on other grounds</i> , 167 F. 2d 369 (2d Cir. 1948).....	31
<i>Emich Motors Corp. v. General Motors Corp.</i> , 340 U. S. 558 (1961).....	20
<i>Hartford-Empire Co. v. United States</i> , 323 U. S. 386 (1945) .....	27, 28
<i>Hecht Co. v. Bowles</i> , 321 U. S. 321 (1944).....	29
<i>Holcomb v. Aetna Life Ins. Co.</i> , 255 F. 2d 577 (1st Cir. 1958) .....	31
<i>International Boxing Club v. United States</i> , 358 U. S. 242 (1959).....	25, 27
<i>International Salt Co. v. United States</i> , 332 U. S. 392 (1947) .....	25, 28
<i>International Shoe Co. v. Washington</i> , 326 U. S. 310 (1945) .....	12
<i>Karseal Corp. v. Richfield Oil Corp.</i> , 221 F. 2d 358 (9th Cir. 1955).....	20
<i>Kinnear-Weed Corp. v. Humble Oil &amp; Ref. Co.</i> , 214 F. 2d 891 (5th Cir. 1954).....	20
<i>Lane v. Brown</i> , 63 F. Supp. 684 (E. D. Mich. 1945)....	31
<i>Lorain Journal Co. v. United States</i> , 342 U. S. 143 (1951) .....	28

	PAGE
<i>Maryland &amp; Virginia Milk Producers Ass'n v. United States</i> , 362 U. S. 458 (1960).....	25
<i>Mascuilli v. United States</i> , 188 F. Supp. 754 (E. D. Pa. 1960) .....	31
<i>Newman v. Granger</i> , 141 F. Supp. 37 (W. D. Pa. 1956), <i>aff'd per curiam</i> , 239 F. 2d 384 (3d Cir. 1957).....	31
<i>Northern Pac. Ry. v. United States</i> , 356 U. S. 1 (1958) .....	20, 23
<i>Ohio Bell Tel. Co. v. Public Util. Comm'n</i> , 301 U. S. 292 (1937) .....	12
<i>Package Mach. Co. v. Hayssen Mfg. Co.</i> , 164 F. Supp. 904 (E. D. Wis. 1958), <i>aff'd</i> , 266 F. 2d 56 (7th Cir. 1959) .....	31
<i>Pfotzer v. Aqua Systems, Inc.</i> , 162 F. 2d 779 (2d Cir. 1947) .....	21
<i>Schine Chain Theaters, Inc. v. United States</i> , 334 U. S. 110 (1948).....	26, 27
<i>Silvera v. Broadway Dep't Store, Inc.</i> , 35 F. Supp. 625 (S. D. Cal. 1940).....	31
<i>Slochower v. Board of Educ.</i> , 350 U. S. 551 (1956).....	15
<i>Stainbach v. Mo Hock Ke Lok Po</i> , 336 U. S. 368 (1949) .....	29
<i>Syracuse Broadcasting Corp. v. Newhouse</i> , 271 F. 2d 910 (2d Cir. 1959).....	31
<i>Terral v. Burke Constr. Co.</i> , 257 U. S. 529 (1922).....	12
<i>Timken Roller Bearing Co. v. United States</i> , 341 U. S. 593 (1951).....	25, 27
<i>Twin Ports Oil Co. v. Pure Oil Co.</i> , 26 F. Supp. 366 (D. Minn. 1939), <i>aff'd</i> , 119 F. 2d 747 (8th Cir.), <i>cert. denied</i> , 314 U. S. 644 (1941).....	21
<i>United States ex rel. Accardi v. Shaughnessy</i> , 347 U. S. 260 (1954).....	10
<i>United States v. Aero Mayflower Transit Co.</i> , 1956 Trade Cas., ¶68526 (S. D. Ga. Sept. 20, 1956).....	30
<i>United States v. Bausch &amp; Lomb Optical Co.</i> , 321 U. S. 707 (1944).....	27
<i>United States v. Brunswick-Balke-Collender Co.</i> , 203 F. Supp. 657 (E. D. Wis. 1962).....	16, 17, 18, 19, 20, 22

	PAGE
<i>United States v. Crescent Amusement Co.</i> , 323 U. S. 173 (1944) .....	25
<i>United States v. E. I. duPont de Nemours &amp; Co.</i> , 366 U. S. 316 (1961) .....	27
<i>United States v. Hartford-Empire Co.</i> , 1 F. R. D. 424 (N. D. Ohio 1940) .....	28
<i>United States v. Loew's Inc.</i> , 83 S. Ct. 97 (1962) .....	27
<i>United States v. Maryland &amp; Virginia Mill Producers Ass'n</i> , 22 F. R. D. 300, (D. D. C. 1958) .....	31
<i>United States v. National City Lines, Inc.</i> , 134 F. Supp. 350 (N. D. Ill. 1955) .....	18
<i>United States v. National Lead Co.</i> , 332 U. S. 319 (1947) .....	25, 26, 27
<i>United States v. Paramount Pictures, Inc.</i> , 334 U. S. 131 (1948) .....	27
<i>United States v. Standard Oil Co.</i> , 1958 Trade Cas., ¶69212 (S. D. Cal. Oct. 31, 1958) .....	30
<i>United States v. United States Gypsum Co.</i> , 340 U. S. 76 (1950) .....	27, 29
<i>United States v. W. T. Grant Co.</i> , 345 U. S. 629 (1953) .....	25, 26, 32
<i>Vitarelli v. Seaton</i> , 359 U. S. 535 (1959) .....	10
<i>Wieman v. Updegraff</i> , 344 U. S. 183 (1952) .....	10, 11

#### STATUTES.

Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. 16,	
Section 5 .....	7, 19
Section 5(a) .....	8, 15, 17, 20, 21
False Claims Act,	
31 U. S. C. 231-233 .....	3
Sherman Act, 26 Stat. 209, as amended, 15 U. S. C.	
1, et seq.,	
Section 1 .....	3, 16
Section 2 .....	16, 27

## AUTHORITIES.

	PAGE
Att'y Gen. Nat'l Comm. Antitrust Rep. 361 (1955)....	24
Dabney, <i>Consent Decrees Without Consent</i> , 63 Colnm. L. Rev. 1053 (1963).....	16
Fed. R. Crim. P. 11.....	21
Handbook of Recommended Procedures for the Trial of Protracted Cases adopted by the Judicial Con- ference of the United States in March 1960.....	29
Pomeroy, <i>Equity Jurisprudence</i> § 109 (5th ed. 1941)	29
Seminars On Protracted Cases for United States and District Judges, 23 F. R. D. 319, 21 F. R. D. 395....	30
The Report on Procedure in Anti-Trust and Other Protracted Cases Adopted by the Judicial Con- ference of the United States, 13 F. R. D. 62.....	30
Timberg, <i>The Antitrust Laws From the Point of View of a Government Attorney</i> , 1 Hoffman's Antitrust Law and Techniques 165 (1963).....	24

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**BRIEF FOR APPELLEES.**

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**Opinion Below.**

The opinion of the district court (R. 125) is not yet reported.

**Jurisdiction.**

The jurisdictional requisites are sufficiently stated in the Brief for Government.

**Statutes Involved.**

The statutes involved are sufficiently stated in the Brief for Government.

### Questions Presented.

The bakeries (the appellees) filed a motion for entry of a judgment against them providing more extensive injunctive relief than would have been required were the allegations of the complaint proved in their entirety. The district court, as part of its pre-trial procedure, issued an order to show cause why the bakeries' motion for entry of judgment against them should not be granted. The government in response to said order offered neither to amend its complaint, nor to disclose any evidence that would justify more extensive relief than that provided by the proposed judgment, and took the position that "the Government was under no duty to reveal all of its evidence in answer to the rule nisi." The district court thereupon entered its final judgment in the form proposed by the bakeries. Under these circumstances:

- I. Did the district court have the power to enter a judgment over the arbitrary objections of the government?
- II. Did the district court properly exercise its broad equitable powers and pre-trial procedures by entering as its judgment that which was proposed by the bakeries?

### Statement.

On March 6, 1961, a federal grand jury returned to the court below a true bill (R. 21-25) indicting five bakery companies (the appellees) for an alleged combination and conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act. Thereafter, the bakeries

pleaded *nolo contendere* to the indictment and paid substantial fines as a result thereof.<sup>1</sup>

Subsequently, on July 21, 1961, the government filed in the same court and against the same parties a complaint (R. 1-9) in two counts, which complaint was comprised of substantially the same allegations as those contained in the previous indictment (R. 95). The complaint charged the bakeries with an alleged combination and conspiracy to allocate among themselves the business of supplying bakery products (defined as bread and rolls) to federal naval installations in the Jacksonville area<sup>2</sup>, and to submit non-competitive and rigged bids and price quotations on such business. Count I charged that such conduct violated the False Claims Act (31 U. S. C. 231-233), and sought forfeitures and double damages as provided in that Act (R. 3-6). Count II set forth in considerable detail certain alleged conduct of the bakeries regarding their bidding practices and charged that such conduct violated Section 1 of the Sherman Act, and sought the following relief: (1) an adjudication that the bakeries had violated that Act; and (2) an injunction prohibiting the bakeries from allocating among themselves the business of supplying bakery products to the federal naval installations in the Jacksonville area and submitting noncompetitive and rigged bids and price quotations for such business (R. 6-8). The complaint

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<sup>1</sup> The *nolo contendere* pleas were accepted and fines imposed after a fully reported day-long hearing in open court before District Judge Bryan Simpson. The bakeries take issue with the government's statement that government counsel only briefly discussed the facts involved in the case at the time of said hearing. See Brief for Government, p. 4, n. 1.

<sup>2</sup> The "Jacksonville area" is defined in both the indictment and the complaint as "the area within (1) the northern part of the State of Florida, and (2) the southeastern part of the State of Georgia" (R. 2, 21).

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further contained the customary catch-all prayer for general relief and costs (R. 9).

On February 8, 1962, the court below gave notice to all parties that the case was "set for hearing and disposition of all pending matters and preliminary pre-trial conference on March 22, 1962 at 10:00 A. M. with a view to narrowing of issues, limitation of discovery, and other pertinent matters" (R. 136-137). That notice further directed that counsel should attend the hearing prepared to discuss the date for a final pre-trial hearing and the date of trial. This hearing was held.

Prior to May 8, 1962, the parties engaged in extensive settlement negotiations on both Counts I and II (R. 58-60), during which time the parties agreed to dispose of Count I by the bakeries' payment of \$44,000.00 (R. 60)<sup>3</sup>, without, however, reaching any settlement agreement regarding Count II although the parties had made concessions and submitted alternative proposed judgments (R. 58-77). Thereafter, on May 8, 1962, the court below entered an order dismissing Count I (R. 42).

Also, on May 8, 1962, at the pre-trial conference had "on all remaining issues" (R. 44) in the case, the bakeries filed with the court a motion for entry of judgment (R. 34-37) to which was attached a proposed form of judgment on Count II (R. 38-41) covering all the allegations of fact and specific prayers of the complaint, and more. The government also tendered to the court a proposed form of judgment on Count II (R. 139-142) which was different from that of the bakeries.

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<sup>3</sup> Count I was predicated on the alleged damages suffered by the government because of the alleged violations of the False Claims Act and was to recompense the government for such damages. Under the allegations of the indictment and of the civil complaint the government was the only party alleged to have been injured from the alleged unlawful conduct of the bakeries.

After a full discussion of Count II, the district court, effectively to utilize pre-trial procedures, ordered the government to show cause on June 14, 1962, why the court should not enter the judgment proposed by the bakeries and afforded the government an opportunity to file a "written formal reply" on or before June 1, 1962 (R. 44). Thereafter, the government failed and refused to comply with that order in that it did no more than submit a list of three objections (R. 44-45), and a memorandum (R. 45-52) in support thereof to which the government limited its oral argument on June 14, 1962 (R. 80-96).

Prior to the pre-trial hearing on June 14, 1962, the bakeries filed an amended motion for entry of judgment (R. 53-57) attaching thereto a proposed form of final judgment on Count II<sup>4</sup> providing even more extensive relief than that afforded by their previous proposal. At the same time, the bakeries filed an affidavit (R. 58-60) in support of the amended motion, which affidavit set forth in considerable detail the history of the settlement negotiations, the government's viewpoints and the good faith efforts of the bakeries (R. 101).

After an extensive hearing on June 14, 1962, the bakeries made one additional concession<sup>5</sup> thereby leaving unresolved only one substantial issue; viz, the injunction against conspiring to fix prices of bakery products covered only sales to the federal government, its agencies and instrumentalities, rather than to the general public as

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<sup>4</sup> The bakeries' proposed form of final judgment on Count II was identical to that which was subsequently entered by the court (R. 129-132) except that in paragraph V thereof it provided for only a "three" year period rather than a "five" year period.

<sup>5</sup> The bakeries agreed to extend from three to five years the period during which they would be required to submit formal statements of non-collusion on bids for any bakery products to any governmental agency (R. 112).

well.<sup>8</sup> At the conclusion of said hearing, the government declined the opportunity of a rebuttal argument (R. 111), whereupon the court granted thirty days within which the government was permitted to file a reply brief or written objections if it so desired (R. 113).<sup>9</sup>

Subsequently, on July 16, 1962, the government filed a reply brief (R. 120-124) which, for all practical purposes, did nothing more than to assert that the court was powerless to enter any judgment without the consent of the government.<sup>10</sup> At no time did the government attempt to amend its allegations of fact or specific prayers for relief.<sup>11</sup> Nor did the government submit any affidavits<sup>12</sup> or disclose any evidence in support of the broad scope of injunctive relief which, it asserted, was required by the facts alleged. Instead, the government maintained that it was not required

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<sup>8</sup> Henry M. Stuckey, trial attorney for the government, stated: "I think the only argument left with this new judgment, Your Honor, is the fact that the Judgment Section wants the decree to go to the general public, not just Government installations...." (R. 93-94).

<sup>9</sup> On June 22, 1962, the district court entered an order permitting the government to file a "written reply and/or brief" on or before July 15, 1962, or "a written statement that the Plaintiff [the government] does not desire to file any such written reply or brief" (R. 120).

<sup>10</sup> In its reply brief, the government noted that one of the bakeries, Ward Baking Company, had been indicted in Philadelphia on June 27, 1962, on a charge of conspiring with five other bakery companies (none of the five being here involved) to fix the prices of "economy" bread sold in the Philadelphia-Trenton area (R. 124). The government was yet to disclose that Ward Baking Company was subsequently acquitted of the charge.

<sup>11</sup> "The plaintiff [the government] did not, in response to the order to show cause, file or attempt to file any amendments to the complaint relating to the facts upon which the injunctive relief was prayed for or to broaden the scope of the injunctive relief requested" (R. 127).

<sup>12</sup> The only affidavit filed by the government was that of Henry M. Stuckey, trial attorney for the government, which affidavit does not relate to the government's evidence (R. 77-78).

to disclose its evidence in response to the court's order<sup>11</sup> and indicated that the burden was on the bakeries to show that there was no basis for the more extensive relief demanded by the government.<sup>12</sup>

On December 10, 1962, the district court granted the bakeries' motion for entry of judgment (R. 125-129) and entered as its final judgment that which was previously proposed by the bakeries (R. 129-132).<sup>13</sup> In so doing, the court held that, on the record before it, the government's demand for including a provision whereby the injunction would relate to sales of bakery products to the general public did not have a reasonable basis and that the insistence of the government on the inclusion of such a provision constituted arbitrary and unauthorized conduct and frustrated the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act (R. 128). The court further held that, on the record before it, the form of the proposed judgment tendered by the bakeries provided the government with every safeguard needed to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint and that the judgment afforded all the relief that the government would be entitled to after entry of a decree *pro confesso* against each of the bakeries and after a trial on the allegations of the complaint (R. 128).

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<sup>11</sup> "[T]he Government was under no duty to reveal all of its evidence in answer to the rule nisi" (R. 123).

<sup>12</sup> "The defendants [the bakeries] have offered no proof which would justify the Court in holding that a repetition of the offense in another place with respect to other products sold by them is unlikely" (R. 49).

<sup>13</sup> See note 4 *supra* and accompanying text.

### Summary of Argument.

The district court over the objections of the government entered a decree which did not contain an adjudication of guilt. The district court had afforded the government an opportunity to bring forth some statement or memorandum of facts which would indicate that the relief which it was seeking was not arbitrary. The government refused this opportunity apparently because it felt that the district court had no power to enter a decree not containing an adjudication of guilt unless the government consented. The government cannot be arbitrary in its dealings with private persons. The fifth amendment prohibits this where the government deprives a person of a right or where it merely proceeds arbitrarily with respect to that person. When the government in the present case refused to show by some slight statement or memorandum of facts that its conduct was not arbitrary it conceded that as to matters outside of the record its conduct was in fact arbitrary.

Section 5(a) of the Clayton Act contains a proviso which permits a defendant to capitulate to the government's substantive demands without having the effect of that capitulation used as *prima facie* evidence against him.

In this case the government attempted to deprive the bakeries of the benefit of that provision by forcing them to accept unwarranted and arbitrary provisions in the decree or else be deprived of the benefit intended by Congress in enacting Section 5(a) by subjecting the bakeries to an adjudication of guilt. The government was attempting a squeeze play to enforce its claimed arbitrary powers; it denied power in the court to act without an adjudication of guilt and it forced the bakeries to a Hobson's choice position in demanding arbitrary provisions in its proposed consent judgment. This would mean that the government could demand whatever it desired and the court would be

powerless to relieve against its arbitrary actions. Furthermore, the government's complaint did not ask for relief even as broad as that finally awarded by the district court. These factors clearly show that the government's request for broader relief was arbitrary and was used in an attempt to force the bakeries to waive the benefit afforded them by Congress.

In criminal cases a district court may accept a *nolo contendere* plea over the objection of the government and though this be done the defendant still has the benefit of the proviso. The court in civil cases should have the same discretion to enter a decree when there is actually no real factual dispute and the government seeks by arbitrary action to deprive defendants of similar "*nolo contendere* pleas" under the proviso.

Since the court had authority to enter its decree over the objection of the government, the sole question which this Court must decide is whether the district court abused its discretion in denying to the government the broader relief which it requested. It must be remembered that the government was afforded an opportunity to bring forth some statement or memorandum of facts which would justify the district court's broadening of the injunction. When the government failed to do this, it relegated itself to having the district court's discretion reviewed on the basis of the record. The district court's injunction was much broader than the alleged violation, and the government's proposed provision does not attack any specific practice of the bakeries but is merely an injunction to obey the law.

The district court in the exercise of broad equity powers could enter its decree in the pre-trial stage of the proceedings, because at that time there were no unresolved substantive issues of fact. In this situation the court is not helpless to conclude litigation and award the relief requested in the complaint and justified on the record.

## ARGUMENT.

**I. UNDER SECTION 5(a) OF THE CLAYTON ACT THE DISTRICT COURT LEGITIMATELY HAD THE POWER TO ENTER THE BAKERIES' DECREE BECAUSE THE GOVERNMENT'S OBJECTION TO ENTERING THAT DECREE WAS ARBITRARY.**

**A. The District Court had the power to test the arbitrariness of a demand by the government in consent decree negotiations.**

The fifth amendment to the United States Constitution prohibits the federal government from taking property without due process of law. That amendment proscribes arbitrary action by any branch of the federal government. The Attorney General in his dealings with other citizens cannot act in an arbitrary manner because the Attorney General is an authorized representative of the federal government. The bakeries contend that in the present case the government's deliberate refusal to produce in the district court some statement, memorandum, or other summary of facts to show a reasonable basis for the demanded relief, precludes the government from objecting to the district court's exclusion of the broader injunctive provisions from the decree that was entered.

Numerous decisions of this Court have struck down arbitrary or capricious executive conduct. *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260 (1954) (Attorney General's dictating decision of inferior board precluded exercise of discretion by board); *Vitarelli v. Seaton*, 359 U. S. 535 (1959) (Secretary did not abide by the rules which he had promulgated for governing the situation); *Wieman v. Updegraff*, 344 U. S. 183 (1952) (mere membership in organization as distinguished from knowing membership is arbitrary ground for exclusion

from public employment). Moreover, the prohibition against arbitrary conduct does not depend upon the existence of a right in the person against whom the executive is moving.<sup>14</sup>

Even the most far reaching decision from the standpoint of executive power, *Cafeteria & Restaurant Workers v. McElroy*, 367 U. S. 886. (1961), clearly reveals that the government does not have the power to act arbitrarily. In *Cafeteria & Restaurant Workers* an admiral had refused entry to a naval base to a cafeteria worker on the ground that she was a security risk after a determination to that effect by a base security officer. The Court held that the admiral had power to deny her permission to enter the base and it also held that the fact that she was not afforded a conventional trial did not offend the Constitution. The Court realistically observed that the question of whether the government had violated due process could not be answered by merely concluding that the cafeteria worker had no right of entry to the naval base, because the fifth amendment prohibited the government from adopting an arbitrary procedure to achieve a given result. *Id.* at 894-95. The Court pointed out that "the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Id.* at 897-98. Moreover, the Court conceded that the cafeteria worker could not have been excluded if the grounds for her exclusion had been "patently arbitrary or discriminatory. . . ." *Id.* at 897.

The touchstone in these cases is not that the injured persons have a specific substantive right but rather that

<sup>14</sup> The Court in *Wieman v. Updegraff*, 344 U. S. 183, 192 (1952), stated that it "need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

they have a general right which gives them protection against arbitrary government action.<sup>15</sup>

Finally, the doctrine applicable to individuals is also applicable to corporations which, like individuals, are protected by the due process clause from arbitrary governmental action. See *International Shoe Co. v. Washington*, 326 U. S. 310 (1945); *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U. S. 292 (1937); *Terral v. Burke Constr. Co.*, 257 U. S. 529 (1922).

In the present case the district court ordered the government to show cause why the proposed decree should not be entered. The government could have met this order by showing a reasonable basis in fact in whatever fashion it chose. When it failed and refused to make such showing, it conceded that, with respect to matters outside the record, its action was arbitrary.

Since the Attorney General may not act arbitrarily with respect to private parties, it is the proper function of the district court to require the Attorney General to demonstrate by some reasonable method that he is not acting arbitrarily. This is as true in the enforcement of the anti-trust laws as it is in other types of governmental action. It is not incumbent upon the Attorney General to prove to the satisfaction of the district court that the action he is taking is the correct action or the only action which he must take under the circumstances. The only test which the government must meet is that its action has some reasonable

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<sup>15</sup> The Court by recognizing a category less than a right but nevertheless protected from arbitrary government action has accommodated necessary executive prerogatives to essential "sub-rights." Thus a jury trial is not essential to the adequate protection of the subright, see *Cafeteria & Restaurant Workers v. McElroy*, 367 U. S. 886 (1961), though it would be, if a right were involved.

basis. In its brief, the government's attack on this point is misplaced because it argues that the district court may not consider whether the Attorney General has made an erroneous decision. Brief for Government, p. 31. In this case the bakeries contend that the district court was not seeking to judge the correctness of the government's decisions but was attempting merely to ascertain whether its demands were arbitrary in light of the record and facts which it could state that it could prove.

No trial on the merits is necessary to test arbitrariness. The order of the district court in this case did not cut off the presentation of the government's case. Instead, it sought in effect to determine whether the government had a case on the further relief demanded. The government could have shown by a fact memorandum or other means that there was a reasonable basis for the further relief it sought, and with such showing, if the bakeries continued in their refusal to consent to the further relief, a trial on the merits would have been justified. The government could not or would not bring forth the slightest factual basis by which the government might show that its request was not arbitrary. The district court cannot present the government's case for it.

The government contended that it had unfettered discretion as to the conduct of the litigation and refused to bring forth any showing of a reasonable basis for its demand. The district court therefore was justified in entering the decree proposed by the bakeries. In its order the district court stated:

The demand of the plaintiff as to the inclusion of two controversial provisions in its tendered judgment does not have a reasonable basis under the circumstances here present. The insistence of the plaintiff on the inclusion thereof constitutes arbitrary and

unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act and thus avoid a costly and protracted trial for the parties (R. 128).

As an illustration of the ramifications of a result which concedes to the government unlimited discretion, it may be shown that it would be possible for the Attorney General to institute and force to trial antitrust suits against any corporation doing business in interstate commerce in the United States, and thereby impose upon that corporation and its stockholders undue financial burdens if it were not able to or were not afforded a forum in which it might test the good faith of the government's action. Moreover, the Attorney General, if he so chose and if there were no proscription upon his discretion, could single out and harass certain corporations and file numerous unwarranted antitrust actions against them.

The government was obliged to show that its demands were not arbitrary. It refused to do so on the theory that it had unlimited discretion in the handling of antitrust cases. By its refusal to indicate that its action was not arbitrary it perforce conceded that nothing outside the record in this case could justify its demand.

**B. The government's demand for a broader injunctive provision than was prayed for in its complaint was arbitrary and unlawful in view of the record in this case.**

The government refused to bring forth any facts which would show that the relief it was seeking was not arbitrary.<sup>15a</sup> Consequently, it must be concluded that no facts

<sup>15a</sup> There was no limitation in the court's order to show cause, which order called upon the government to show (1) why the court could not legally enter the judgment, a question of power, and (2) why it should not do so on the record, a question of the exercise of the court's power. See also the argument at the June 14, 1962 hearing (R. 106-107).

existed outside the record which could justify its demand for broader relief. Furthermore, the record in the case does not justify the government's demands for there was no showing of a triable issue on the demands, and therefore, even taking the facts in the complaint as admitted the district court properly concluded that the government's request was not only arbitrary but it was also unauthorized (R. 128).

Section 5(a) of the Clayton Act serves a twofold purpose. First, it encourages treble damage actions by giving to small claimants the benefit of the government's investigative and trial resources by providing those claimants with a judgment which will establish a *prima facie* case. Second, it encourages antitrust violators to capitulate by refusing to extend the *prima facie* effect of the judgment where there has been such a capitulation. See *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 5 TRADE REG. REP. (1963 Trade Cas.) ¶70884 (7th Cir. Sept. 12, 1963).

There are numerous cases holding that the government cannot force the waiver of a constitutional right by conditioning some governmental benefit upon the nonexercise of that right. It is clear that the government cannot condition the continuance of an individual's state employment on the waiver of a constitutional right, even though the individual does not have a constitutional right to that employment. See *Slochower v. Board of Educ.*, 350 U. S. 551 (1956).

The government could not impose an unconstitutional condition upon a private party in a consent decree context. Similarly, the government may not impose a condition which is illegal because it achieves in a given situation a result opposite to that decreed by Congress, and deprives the defendant of a benefit afforded by Congress. In short, the government may not rewrite the statute to eliminate

a sanctuary explicitly granted to antitrust violators by Congress. This is precisely what the government attempted and the district court rejected in *United States v. Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E. D. Wis. 1962), a case which is substantially indistinguishable from the present case.

There the government sought an injunction against violations of Sections 1 and 2 of the Sherman Act. The defendants filed a motion for entry of a judgment against them. 203 F. Supp. at 660. The government did not object to the enforcement terms of the decree, but demanded that the decree contain provisions whereby the defendants would admit the charges against them and in which they would agree "to an adjudication that they had violated Section 1 of the Sherman Act as charged, which adjudication would be *prima facie* evidence against them in [certain] treble damage suits. . . ." *Id.* at 660. The district court characterized the government's withholding of its consent as not only arbitrarily denying the moving defendants the right to capitulate but also "frustrating the clear intent of Congress to encourage early entries of injunctive decrees without long and protracted trials." *Id.* at 662.<sup>16</sup>

In *Brunswick* the government's strategy was obvious. Although Congress had decreed that a consent judgment would not have *prima facie* effect, the government sought to give the judgment that effect by attempting to withhold its consent, thus forcing the defendants to waive their statutory right. Apparently the government believed that it could arbitrarily refuse to consent even though there

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<sup>16</sup> Apparently Judge Wyzanski in *United States v. Asphalt & Petroleum Co.*, believed that the court had the power in the exercise of its discretion to enter a decree granting all substantive relief but denying an adjudication of guilt. See Dabney, *Consent Decrees Without Consent*, 63 COLUM. L. REV. 1053, 1059-60 (1963).

were no disputed issues and thus compel the defendants to waive the benefit of the proviso. This conduct was not merely arbitrary; it was unlawful.

In the case at bar the tactics of the government while less direct are perhaps more sophisticated. Obviously the government's primary purpose was to extract from the bakeries an adjudication of guilt or to force them to accede to arbitrary injunctive provisions not warranted by the record and to which the government clearly would not be entitled after a trial on the merits. In its first brief filed in opposition to a motion for entry of a consent judgment, the government listed its objectives in the following order: an adjudication of guilt, public exposure of the bakeries and their officials, and broader injunctive relief (R. 47-48). Moreover, in the government's final brief it candidly conceded that "if the defendants are willing to admit the charge, the Government would have to be satisfied with the relief which the Court would, on the basis of the pleadings, deem appropriate, subject to its right to appeal" (R. 123). Furthermore, the government in its complaint merely requested an injunction prohibiting price fixing with respect to bread and rolls to naval installations in the Jacksonville area (R. 8). Subsequently, the bakeries consented to extending the scope of relief to include sales of all bakery products to all federal installations wherever located. Nevertheless, the government in an attempt to obtain an arbitrary and unwarranted injunction over the activities of a considerable portion of the baking industry, again extended its injunction request to include a broad injunction to obey the law. This is arbitrary conduct.

Thus, the government, unwilling to find itself again in a situation similar to that in *Brunswick*, took the position that it wanted broader substantive relief than that justified by the pleadings for the purpose of forcing the bakeries into

accepting an adjudication of guilt thereby depriving them of any salutary effect afforded by the Section 5(a) proviso, or of accepting arbitrary injunctive provisions.<sup>17</sup> The government hoped to achieve its desired ends in cases similar to the present case by adopting a method less blatant than that chosen in *Brunswick*.

In *Brunswick* the court was faced with a situation in which the parties had resolved all of the issues in the case; and the government's insistence on an adjudication of guilt, which would deprive the defendants of the benefit of the statutory proviso, dramatically revealed a conflict between Congress and the Attorney General. Superficially the present case would not seem to fit the *Brunswick* mold and therefore might appear more innocuous; for the government in the present case has placed the litigation in a posture which at first glance does not appear to present as obvious an illustration of legislative-executive clash as does *Brunswick*. Actually, however, the two cases are substantively indistinguishable because in the present case the government, rather than find itself in the position of refusing to consent to a decree where there were in fact no unresolved issues, deliberately attempted to hold out an issue under the guise that it was genuine and still unresolved.

It must be remembered that the government's unamended complaint did not ask for relief even as broad as that acceded to by the bakeries in their proposed judgment. The government has in effect assumed three separate positions on the question of the scope of the injunctive provision. Its last position, a demand that the injunction prohibit price

<sup>17</sup> In *United States v. National City Lines, Inc.*, 134 F. Supp. 350, 356 (N. D. Ill. 1955), the court recognized that when the government is the plaintiff in an antitrust suit "elemental fairness" demands that the issues respecting injunctive relief "be determined with reliable certainty by the pleadings" because unlike a private case where the interests are limited the government's interest is as wide as the national economy.

fixing to the general public, is not only a geographical expansion but also a customer expansion which goes far beyond the alleged violation of price fixing to naval installations in the Jacksonville area.

In the present case the government consciously refused to make a showing which would establish its demands as at least reasonable.<sup>18</sup> The government is holding out for relief not justified by the pleadings or the record. Based on the pleadings and the record which shows no disputed facts or triable issues, it must be deemed adequate because it far surpasses the allegations and the prayer for relief. What the government might have shown is irrelevant because by deliberate default it is restricted to the pleadings and the record established in the court below.<sup>19</sup>

The government has used the device of asking for relief greater than that justified by the pleadings and the record in refusing to consent to the decree in an effort to camouflage the arbitrariness of its action as manifested in *Brunswick*. The bakeries maintain that there is no difference in substance between the government's refusal without excuse to consent in *Brunswick* and its refusal to consent in the present case where the excuse is merely that it is not satisfied with the scope of relief when the relief exceeds that prayed for in the government's complaint. The plain fact

<sup>18</sup> In its brief the government states that "there is nothing in the language, legislative history, or basic policy of Section 5 which in any way suggests that it was intended to limit the Attorney General's broad discretion to determine the kind of final injunction that the government will accept without a trial." Brief for Government, p. 29. The government's attitude indicates that it intentionally failed to comply with the show cause order so as to avoid any appearance of conceding the fact that its consent decree program is, to any degree, subject to review by the judiciary.

<sup>19</sup> The government by attaching to its brief the indictment in Case No. 11676J, Brief for Government, pp. 35-40, suggests that the record as made in the court below does not justify their demand for broader relief. In this regard it should be noted that Derst Baking Company was not a defendant in that action.

is that the government's excuse for not consenting in this case is merely one with superficial attractiveness. In reality the government has no legitimate excuse. Thus, in the present case as in *Brunswick* the government seeks to write the proviso out of the statute by the use of government power, and the district court as in *Brunswick* refused to sanction that conduct.

C. The District Court may in its discretion enter a decree under Section 5(a) over the objection of the government in a manner similar to the acceptance by it of a plea of *nolo contendere*.

The action by the district court in the case at bar in entering the decree over the objection of the government is analogous to the acceptance of a plea of *nolo contendere* over the objection of the government. In both situations the district court is making an accommodation between dual statutory purposes.

The *prima facie* evidence portion of Section 5(a) was intended by Congress to save private litigants time and expense. *Erich Motors Corp. v. General Motors Corp.*, 340 U. S. 558, 568 (1961). The proviso was intended to aid antitrust enforcement by encouraging capitulation by defendants in order to avoid the *prima facie* evidence rule. "Both purposes of Section 5(a) and its proviso serve the broad objective of anti-trust enforcement, and although the two purposes are distinct, '... an accommodation must be made to preserve the essence of both.'" *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 5 TRADE REG. REP. (1963 Trade Cas.) ¶70884, at 78556-57 (7th Cir. Sept. 12, 1963).<sup>20</sup> The district court in the exercise of its discretion

<sup>20</sup> See also *Northern Pac. Ry. v. United States*, 356 U. S. 1, 4 (1958); *Karsenal Corp. v. Richfield Oil Corp.*, 231 F. 2d 358 (9th Cir. 1955); and *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 214 F. 2d 891, 893 (5th Cir. 1954).

must accommodate the dual purposes of Section 5(a) with the broader purpose of antitrust enforcement.<sup>20a</sup>

The rejection or acceptance of a *nolo contendere* plea by a district court in a criminal antitrust action is an example of such an accommodation. A district court can accept a plea of *nolo contendere* over the objection of the government, see Fed. R. Crim. P. 11, and such a judgment comes within the terms of the proviso.<sup>21</sup> Since the judgments contemplated by the proviso include those in both criminal and civil cases, see *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, *supra.*, it is logical that the same discretion be vested in the district court where a defendant wishes to capitulate in a civil action without coming under the *prima facie* rule. Here, as in the criminal case, the district court in the exercise of its discretion must weigh the respective values of the purposes of Section 5(a). If it deems the avoidance of the *prima facie* rule to be the best means in a particular case to effectively enforce the antitrust laws, it should enter a "consent" decree over the objection of the government. If it deems that the *prima facie* rule should be invoked, it should refuse to enter such a decree and permit the case to be tried. The analogy to the *nolo contendere* situation is obvious.

If this could not be done, the government could always file a companion civil suit virtually identical to the indictment as was done in the present case, refuse to consent to a decree, and thus force the defendant to accept a pro-

<sup>20a</sup> Only one of the dual purposes need be considered in the present case since an adjudication of guilt could not possibly aid private litigants. The complaint related only to sales to a governmental agency and, based on the pleadings, the only recoverable damages were paid upon settlement of Count I.

<sup>21</sup> See *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 119 F. 2d 747 (8th Cir.), *cert. denied*, 314 U. S. 644 (1941). See also *Pfotzer v. Aqua Systems, Inc.*, 162 F. 2d 779, 784 (2d Cir. 1947) (L. Hand, J.).

vision which eliminates the benefit of the proviso, thereby depriving the defendant of the very thing which prompted him to plead *volo contendere* in the criminal case.

There may be cases in which private parties and the government are in honest disagreement as to the terms of a consent decree and, therefore, both are willing to go to trial. Where the defendant does not agree to the inclusion in the consent decree of relief clearly warranted by the complaint or the record, he may not get the benefit of the proviso, and a trial is warranted. Where, however, the defendant does agree to the inclusion in the consent decree of the relief warranted by the complaint or the record, and the government demands further relief not so warranted in an attempt to force the defendant to give up the benefit of the proviso, the district court may step in and make an accommodation. If the government is indeed arbitrary, the decree should be entered; if it is not, the case should be tried. The determination is within the discretion of the district court. Any other result would remove from the district court its power to protect the intent of Congress and its discretion to exercise its equity power prior to trial, and would vest that power and discretion in the government. The government would be able to prevent the exercise of the district court's power by holding out a sham issue as unresolved. Judicial discretion must never be encroached upon by the executive. The judiciary must retain its full power so that it may afford relief against arbitrary conduct, to insure that a defendant will not be put to a "Hobson's Choice."<sup>22</sup>

<sup>22</sup> "[T]his court sitting, as a court of equity is not powerless under such circumstances to afford the defendants a form of relief other than the Hobson's choice of either further capitulating to an arbitrary and unauthorized demand of the Government or undergoing the ordeal of a costly and protracted trial." *United States v. Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wis. 1962).

#### **D. The action of the District Court enhances antitrust enforcement.**

Public policy favors the action of the district court, and antitrust enforcement will benefit by it. Aside from the conflict between the constitutional branches of the government and from the repugnance of arbitrary governmental action, it is necessary to insure that the antitrust laws are properly enforced. The government cannot honestly claim that it needs the right to act arbitrarily with no judicial review in the area of consent judgments in order properly to enforce the antitrust laws. No enforcement agency may exercise such unfettered power under the guise of law enforcement.

An easy and apparently plausible argument may be made that a decree which ends antitrust litigation without trial, and includes an adjudication of guilt, would be effective in antitrust enforcement because it both ends the violation and affords treble damage plaintiffs the *prima facie* rule. However, the flaw in this argument is that such decrees would in truth have the opposite effect. Defendants, no longer able to benefit by the proviso, would be much more inclined to fight to the end in an attempt to avoid the treble damage liability. Accordingly, consent decrees would be correspondingly more difficult for the government to obtain. The courts would be forced to try significantly more "big", protracted cases, and the government, without inordinate expenditure of public funds, would be unable to reach as many violations. By its overemphasis on the benefits to private plaintiffs, the government is lessening its effectiveness in the area of enforcing the over-all intent of the antitrust laws, to preserve "free and unfettered competition as the rule of trade."<sup>23</sup>

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<sup>23</sup> *Northern Pac. Ry. v. United States*, 356 U. S. 1, 4 (1958). A government attorney has made similar observations, and has concluded that the congressional sanction of the consent decree

It has been urged that the government should demand whatever relief its bargaining position may coerce. "[T]hat view ignores the prosecutor's responsibility to stay within statutory and constitutional bounds. It threatens our goal of equitable law enforcement and, accordingly, should be rejected." ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 361 (1955).

**II. THE SUPREME COURT'S REVIEW IN THIS CASE IS MERELY ONE OF REVIEWING THE DISTRICT COURT'S DISCRETION AND THE GOVERNMENT HAS NOT SHOWN THAT THE COURT HAS ABUSED ITS DISCRETION; NOR HAS THE GOVERNMENT SHOWN THAT IT HAS BEEN LEFT WITHOUT A REMEDY BECAUSE THE DISTRICT COURT HAS EXPRESSLY RETAINED JURISDICTION OF THE CASE.**

The first part of this brief demonstrated that the district court had the authority to enter over the government's objection a decree which did not contain an adjudication of guilt. Therefore, the only question remaining in this case is whether the district court abused its discretion in entering a decree without trial in which the scope of relief is less than that demanded by the government.<sup>34</sup> The district

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"has made possible a greatly increased coverage of the field of antitrust violations and thereby has helped private plaintiffs." Timberg, *The Antitrust Laws From the Point of View of a Government Attorney*, 1 HOFFMAN'S ANTITRUST LAW AND TECHNIQUES 165 (1963).

<sup>34</sup> In its brief the government concedes that the court has some authority, before trial, to determine if anything could be developed under an offer of proof which could possibly justify additional relief. Brief for Government, p. 12. The government's concession, however, is conditioned on there being an adjudication of guilt, but this condition apparently stems from the government's notion that the district court has no authority to enter a consent decree over the objection of the government. The bakeries contend and have demonstrated in part one of this brief that the court has such authority.

court in affording the government an opportunity to show that its demands were not arbitrary also afforded the government the opportunity to justify the broader scope of relief which it requested. In refusing to come forth with some type of statement or memorandum of facts the government, by necessity, relegated itself to attacking the district court's discretion as it was exercised in light of the pleadings and the record, and not upon what it might have proved if the case were tried.<sup>25</sup> The principles of elemental fairness demanded that the bounds of the issue relating to injunctive relief be determined with reasonable certainty by the pleadings. See *United States v. National City Lines, Inc.*, 134 F. Supp. 350, 356 (N. D. Ill. 1955).

This Court has recognized the "wide range of discretion in the District Court" to adapt its decree in Sherman Act cases to the particular case before it and has stated that the Court "will not direct a recasting of the decree except on a showing of abuse of discretion."<sup>26</sup> In numerous instances this Court in antitrust cases has refused to modify the district court's decree because the drafting of the decree is left to its discretion.<sup>27</sup> Because the review

<sup>25</sup> In *United States v. W. T. Grant Co.*, 345 U. S. 629 (1953), the Court refused to find an abuse of discretion in not enjoining future violations because the complaint alleged no threatened violations, and the government in not accepting the opportunity to file affidavits or amend its complaint was restricted to its complaint.

<sup>26</sup> *United States v. Crescent Amusement Co.*, 323 U. S. 173, 185 (1944). See *Timken Roller Bearing Co. v. United States*, 341 U. S. 593 (1951). The purpose of an injunction in a Sherman Act case is not to punish the defendant. *International Salt Co. v. United States*, 332 U. S. 392, 401 (1947). It is to prevent continued or future violations of the Sherman Act. *United States v. National Lead Co.*, 332 U. S. 319, 335 (1947). The test of the success of a civil suit is whether it effectively pries "open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co. v. United States*, *supra*, at 401.

<sup>27</sup> See, e. g., *Maryland & Virginia Milk Producers Ass'n. v. United States*, 362 U. S. 458 (1960); *International Boxing Club v. United States*, 358 U. S. 242 (1959); *United States v. W. T.*

is of the district court's discretion, the government "must demonstrate that there was no reasonable basis for the District Judge's decision." *United States v. W. T. Grant Co.*, 345 U. S. 629, 634 (1953). (Emphasis added.)

An analysis of the Court's decisions in this area reveals some perceptible guidelines by which the Court may discover whether there has been in fact an abuse of the district court's discretion. The key to these cases is the concept of specificity. The Court has said that "the precise practices found to have violated the act should be specifically enjoined." *Schine Chain Theaters, Inc. v. United States*, 334 U. S. 110, 126 (1948).

It is one thing to enjoin specific acts which while not themselves illegal may, when combined with others, violate the act; it is another to enjoin conduct proscribed by the statute itself. The utility of enjoining specific conduct which is not in itself objectionable is apparent because such an injunction is the only method by which those acts may be legally proscribed. Thus, in a situation where the defendant has used many arrangements which collectively have caused it to violate the law, it would be depriving the government of essential antitrust enforcement tools not to enjoin some of those practices which in themselves are not objectionable. However, there is little usefulness in framing a decree in the language of the statute except for the advantage of having possible contempt proceedings as an additional element of deterrence. In one dramatic instance the Court overturned a district court's injunctive

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*Grant Co.*, 345 U. S. 629 (1953); *United States v. National Lead Co.*, 332 U. S. 319 (1943); *Associated Press v. United States*, 326 U. S. 1 (1945). Admittedly, the relief granted by the district court can exceed the proven violation, but this Court has pointed out that when this is done, the Court must "be especially wary lest the trial court overstep the correspondingly narrower limits of its discretion..." *International Boxing Club v. United States*, 358 U. S. 242, 262 (1959).

provision because it was too broad and was in fact framed almost in the exact language of the statute.<sup>28</sup>

There are certain standard remedies which are generally acceptable to the Court. Thus, where there is a Section 2 Sherman Act offense, the Court will require the district court's decree to provide for divestiture.<sup>29</sup> In other cases the Court has ordered modification of the district court's decree to prohibit specific commercial conduct generally lawful in itself which the Court deems to be a necessary ingredient of the violation<sup>30</sup> or to grant specific injunctive relief necessary to police future conduct.<sup>31</sup> In complex patent cases, although the requirement for overturning the district court's discretion is that the Court must find an abuse of that discretion, the tests or criteria for finding such abuse are not as clear as in other types of cases.<sup>32</sup>

<sup>28</sup> In *Schine Chain Theaters, Inc. v. United States*, 334 U. S. 110, 125-26 (1948), the Court required the district court to re-examine a decree provision against monopolizing first and second run films because "public interest requires that a more specific decree be entered on this phase of the case."

<sup>29</sup> See *United States v. E. I. duPont deNemours & Co.*, 366 U. S. 316 (1961); *International Boxing Club v. United States*, 358 U. S. 242 (1959); *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948). In one case where there was no Section 2 violation, the Court eliminated a provision in the decree requiring divestiture. *Timken Roller Bearing Co. v. United States*, 341 U. S. 593 (1951).

<sup>30</sup> See *United States v. Loew's, Inc.*, 83 S. Ct. 97, 106-08 (1962).

<sup>31</sup> See *United States v. United States Gypsum Co.*, 340 U. S. 76, 95 (1950); *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944).

<sup>32</sup> In *Hartford-Empire Co. v. United States*, 323 U. S. 386 (1945), the Court relaxed a great number of stringent injunctive provisions imposed by the district court. However, in *United States v. National Lead Co.*, 332 U. S. 319 (1947), the Court refused to modify any of the numerous restrictive provisions of the district court's decree, and in *United States v. United States Gypsum Co.*, 340 U. S. 76 (1950), the Court both granted and refused to grant some of the government's requests for modification of the district court's decree. In short, the patent cases seem to have limited utility from the standpoint of ascertaining criteria which indicate an abuse of discretion, outside of the patent field.

The government relies heavily on *United States v. Hartford-Empire Co.*, 1 F.R.D. 424 (N.D. Ohio 1940). There the district court refused to enter a decree, denominated by one of the defendants as a "consent decree," proposed in a pre-trial conference. The case is easily distinguishable from the present case. The district court in *Hartford-Empire Co.* did not utilize the procedure of allowing the government to make a proffer of proof and have the relief provisions of the decree either fashioned upon the proffer, or after the proffer have the government present its evidence in a hearing.<sup>33</sup>

In the case at bar, the district court in its decree expressly retained jurisdiction (R. 132). This Court has repeatedly emphasized the prophylactic effect of the retention of jurisdiction by the district court.<sup>34</sup>

The main thrust of the government's attack on the formulation without evidence of a decree by the district court does not meet the issue presented in this case. The government takes the position that the district court cannot fashion appropriate relief unless evidence is produced from which the district court may gather facts necessary for the exercise of its discretion. Brief for Government, p. 13-19. However, the government assumes that the only method

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<sup>33</sup> Actually *Hartford-Empire Co.* presents a dramatic vindication of the procedure used by the district court in disposing of the present case. When *Hartford-Empire Co.* finally reached the Supreme Court there had already been a trial which had lasted 112 days, a district court opinion comprising 160 pages including 628 findings of fact and 89 conclusions of law, a 46-page decree and a 16,500 page record. *Hartford-Empire Co. v. United States*, 323 U. S. 386, 392 (1945).

<sup>34</sup> See *Lorain Journal Co. v. United States*, 342 U. S. 143, 156-57 (1951); *International Salt Co. v. United States*, 332 U. S. 392 (1947); *Associated Press v. United States*, 326 U. S. 1 (1945). In *Associated Press v. United States*, *supra*, at 22-23, this Court stated that if the decree "should not prove adequate to prevent further discriminatory trade restraints... the court's retention of the cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out."

of producing evidence is by a trial. This is not true. Evidence can be produced upon affidavits, by the pleadings, or in a memorandum or statement of facts to be proved. See *United States v. United States Gypsum Co.*, 340 U. S. 76, 86 (1950). In the present case the government had an opportunity to produce this evidence; it chose not to do so. The point is, however, that the district court cannot litigate the government's case and litigation must come to an end.

### III. THE BROAD REMEDIAL POWERS OF AN EQUITY COURT SUPPORT THE DECISION BELOW AND CANNOT BE RESTRICTED BY THE GOVERNMENT.

That the district court may test arbitrariness and enter an appropriate decree is consistent with the historical and natural powers of equity jurisprudence and the *Federal Rules of Civil Procedure*.

There can be no serious question that in deciding injunction cases, the equity court has traditionally enjoyed very broad remedial powers. The landmark case of *Hecht Co. v. Bowles*, 321 U. S. 321 (1944), clearly establishes the wide range of equity powers in injunction cases. Equitable remedies are distinguished by their flexibility, unlimited variety, adaptability to circumstances and the natural rules which govern their use. See POMEROY, *EQUITY JURISPRUDENCE* §109 (5th ed. 1941). Notwithstanding the fusion of law and equity by the *Federal Rules of Civil Procedure*, the substantive principles of equity remain unaffected. *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368, 382 (1949).

The district courts have increasingly used the pre-trial procedures to determine the issues. In the *Handbook of Recommended Procedures for the Trial of Protracted Cases* adopted by the Judicial Conference of the United States in March 1960, there is a recommendation that in civil anti-

trust suits brought by the government one or more pre-trial conferences should be devoted to the question of the relief sought by the plaintiff.<sup>29</sup> The *Handbook*, in discussing that recommendation, suggests that a pre-trial discussion be held to determine what relief would be appropriate were the allegations of the complaint proved in their entirety, with a view that discussions of this type made at pre-trial may dispose of the case without trial. It cites with approval the case of *United States v. Standard Oil Co.*, 1958 Trade Cas., ¶69212 (S. D. Cal. Oct. 31, 1958), where the court held a pre-trial hearing at which counsel were requested to assume that the case had been tried as to liability and that the court had sustained the allegations of the complaint. The question was then posed as to whether the court could, should or would grant divestiture of the defendants' marketing facilities as part of the relief granted. Counsel were asked to submit by briefs the relevant facts to be used as a basis for their showing and argument. After hearing and before trial, the district court ruled that it would not grant the government's prayer for relief requesting divestiture of the marketing facilities.<sup>30</sup>

<sup>29</sup> See 25 F. R. D. 398. See generally *Seminars On Protracted Cases for United States and District Judges*, 23 F. R. D. 319, 21 F. R. D. 395; *The Report on Procedure in Anti-Trust and Other Protracted Cases Adopted by the Judicial Conference of the United States*, 13 F. R. D. 62.

<sup>30</sup> The court stated at p. 74764:

Well, to get down to the problem of what type of relief the Court could grant in this case. I have come to the conclusion that if this case were tried and the defendants were shown to have been in conspiracy to restrain trade and commerce and to monopolize, and assuming the showing made by the defendants as made in this hearing this week, and assuming also the validity of certain matters mentioned by Mr. Lehman [government counsel]—such as irregularities, misconduct, activities since 1950—that this Court should not and would not grant divestiture or divorcement of these service stations.

See also *United States v. Aero Mayflower Transit Co.*, 1956 Trade Cas., ¶68526 (S. D. Ga. Sept. 20, 1956).

Obviously, pre-trial procedures would be useless if litigants were permitted to reveal or conceal at their pleasure. To effectuate the procedures litigants are required to cooperate with the court. Indeed, the parties at a pre-trial conference "owe a duty to the court and opposing counsel to make a full and fair disclosure of their views as to what the real issues at the trial will be."<sup>26</sup> This duty, of course, applies to the federal government just as it does to private litigants. *E.g.*, *Daitz Flying Corp. v. United States*, 4 F.R.D. 372, 373 (E.D.N.Y. 1945), *rev'd on other grounds*, 167 F.2d 369 (2d Cir. 1948).

In the present case the government was given an opportunity to make a record upon which the court could exercise its judgment. The government failed to add to the record and the court was authorized to enter the decree at pre-trial upon the record then before it.<sup>27</sup> The court had the

<sup>26</sup> *Cherney v. Holmes*, 185 F.2d 718, 721 (7th Cir. 1950). A party may not stand pat at pre-trial on general statements of claimed issues for trial. *Package Mach. Co. v. Hayssen Mfg. Co.*, 164 F.Supp. 904, 910 (E.D. Wis. 1958), *aff'd*, 266 F.2d 56 (7th Cir. 1959); *United States v. Maryland & Virginia Mill Producers Ass'n.*, 22 F.R.D. 300, 302 (D.D.C. 1958).

<sup>27</sup> See *Syracuse Broadcasting Corp. v. Newhouse*, 271 F.2d 910 (2d Cir. 1959) (court approved forceful use of pre-trial to define issues); *Masculli v. United States*, 188 F.Supp. 754 (E.D. Pa. 1960) (court has authority to eliminate issues at pre-trial where admitted facts show no reasonable basis for trial of the issue); *Package Mach. Co. v. Hayssen Mfg. Co.*, 164 F.Supp. 904, 910 (E.D. Wis. 1958), *aff'd*, 266 F.2d 56 (7th Cir. 1959) (plaintiff may not rely solely on general factual statements in complaint); *American Mach. & Metals, Inc. v. De Bothezat Impeller Co.*, 82 F.Supp. 556 (S.D.N.Y. 1949) (pre-trial order may pass judgment upon the legal sufficiency of a defense); *Lane v. Brown*, 63 F.Supp. 684 (E.D. Mich. 1945) (where no valid service of process, the district court was authorized at a pre-trial hearing to proceed to judgment); *Silvera v. Broadway Dep't Store, Inc.*, 35 F.Supp. 625 (S.D. Cal. 1940) (court has power at pre-trial to dismiss when the facts admitted and proof show no cause of action). "Since the parties at pre-trial conference agreed upon all necessary and relevant facts and exhibits, a decision on the merits may be entered without formal trial." *Newman v. Granger*, 141 F.Supp. 37, 39 (W.D. Pa. 1956), *aff'd per curiam*, 239 F.2d 384 (3d Cir. 1957); *Holcomb v. Aetna Life Ins. Co.*, 225 F.2d 577 (1st Cir. 1958).

power to do this.<sup>22</sup>

The district court found that since the government's inclusion of the controverted provisions had no basis in fact, it clearly represented an attempt to force the bakeries to admit guilt, thus depriving them of the benefits of Section 5(a), or else to accede to arbitrary and unwarranted demands. The court, as a court of equity, could afford relief against such arbitrary conduct and relieve private litigants placed in a Hobson's choice position.

To sanction the refusal of the government to respond to the order to show cause would also impair the pre-trial procedures utilized by the trial courts in determining the triable issues, and in using summary proceedings to dispose of cases without trial where the facts are undisputed and there are no triable issues.<sup>23</sup>

### CONCLUSION.

For the reasons set out in this brief the decision of the district court should be affirmed.

Respectfully submitted,

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<sup>22</sup> In this case the allegations of the complaint were to be construed as true and since no other facts were brought to the court's attention, there was no issue of fact to be resolved at the trial. Therefore, absent any triable issue, the cases cited on p. 27 of the government's brief are not controlling or applicable here. Most of those cases were jury cases (unlike this equity case) and the courts deciding them made their decisions on the bases that they presented conflicting facts and thus triable issues which the trial courts could not resolve.

<sup>23</sup> *United States v. W. T. Grant Co.*, 345 U. S. 629 (1953). See also cases cited note 37 *supra*.

**CERTIFICATE OF SERVICE.**

I, **CHARLES L. GOWEN**, of counsel in the above case, acting on behalf of all of appellees herein and as a member of the Bar of the Supreme Court of the United States, hereby certify that on the       day of October, 1963, I served copies of the foregoing Brief for Appellees upon appellant, the United States of America, by mailing three copies thereof to **Lionel Kestenbaum, Esq.**, Department of Justice, Washington 25, D. C., and by mailing a copy thereof to **Archibald Cox, Esq.**, Solicitor General, Department of Justice, Washington 25, D. C. Each of the foregoing was sent by Air Mail postage prepaid.

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**Attorney for American Bakeries Company, acting on behalf of the said client, and other appellees named in the foregoing Brief.**